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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ENRIQUE GODOY, Defendant and Appellant.	2d Crim. No. B194465 (Super. Ct. No. NA066111) (Los Angeles County)

Enrique Godoy appeals from the judgment entered following his conviction by a jury of the second degree murder of Chasen Pacheco. (Pen. Code, §§ 187, subd. (a), 189.)[1] The jury found true an allegation that appellant had used a deadly weapon - a knife - within the meaning of section 12022, subdivision (b)(1). He was sentenced to prison for 16 years to life.

Appellant contends: (1) the trial court erroneously failed to conduct an evidentiary hearing to investigate allegations of juror misconduct; (2) a juror's communications with a nonjuror constituted misconduct resulting in a presumption of prejudice that was not rebutted; (3) the trial court abused its discretion and violated appellant's due process rights by denying his motion to continue the hearing on his motion for a new trial; (4) because appellant's counsel was not prepared to argue the new

[1] All statutory references are to the Penal Code.

trial motion, the denial of a continuance violated his right to the effective assistance of counsel and to present an effective defense; (5) section 1050, subdivision (g)(2), is unconstitutional to the extent that it applies only to prosecutors; (6) the trial court erroneously gave the jury an *Allen* charge (*Allen v. United States* (1896) 164 U.S. 492 [41 L.Ed. 528]) implying that the case would necessarily be retried if the jury did not reach a verdict; (7) the People violated discovery requirements by failing to disclose an inculpatory statement that a witness had heard appellant make; (8) the failure to disclose the inculpatory statement resulted in the denial of appellant's right to the effective assistance of counsel; (9) counsel was deficient because he did not object to the admission of the inculpatory statement or seek its exclusion; and (10) the trial court abused its discretion by requiring appellant to be physically present during impact statements from the victim's family and by permitting family members to verbally attack him. We affirm.[2]

Trial Evidence

Appellant lived on the second floor of an apartment building. While appellant and several friends were standing on the balcony of appellant's apartment, Chasen Pacheco appeared below. Appellant and Pacheco had been close friends until a recent dispute over marijuana.

Pacheco asked appellant "to come downstairs so he could talk to him." Appellant went downstairs, and his friends followed him. Appellant and Pacheco started "wrestling on the grass" and were "throwing punches at each other." Appellant's friends broke up the fight.

One of the friends, Brett Voegeli, "grabbed" appellant and pulled him up the stairs toward his apartment. When they reached the top of the stairs, Voegeli let go of appellant. Pacheco "kept trying to talk [appellant] into coming down on the stairs and

[2] On February 6, 2009, appellant filed a petition for writ of habeas corpus (No. B213850) alleging that (1) the trial court erroneously failed to conduct an evidentiary hearing to investigate allegations of juror misconduct, and (2) he was denied the effective assistance of counsel. We deny the petition by separate order.

fight him, to finish the fight." Pacheco went up the stairs toward appellant. Rodolfo Hernandez, who was standing next to appellant, heard appellant say, "Let me finish him off."

When Pacheco reached the top of the stairs, Voegeli tried to stop him. Pacheco "pulled [Voegeli] out of the way" and said to appellant, "Let's finish this." It appeared to Voegeli that Pacheco was drunk.

Pacheco and appellant walked down the stairs to a landing. Pacheco turned and faced appellant. Pacheco had nothing in his hands and did not try to hit or punch appellant. Pacheco said, "What's up?" Appellant stabbed Pacheco in the chest and stomach and punched him in the jaw. Appellant said, "That's what's up," and "Get the fuck out of here." Voegeli testified that appellant "didn't seem scared at all." (2RT 296) Another witness, Christopher Weisser, testified that appellant seemed scared only after he had stabbed Pacheco.

Pacheco died as a result of three stab wounds: one to the chest and two to the abdomen. If left unattended, each wound "could result in death in and of itself."

Appellant lied about the incident to the police. He told them that Pacheco had assaulted him with a knife. Appellant claimed to have taken the knife away from Pacheco and to have used it against him. In fact, the knife belonged to appellant.

The defense theory was that appellant had stabbed Pacheco in self-defense. Appellant testified that Pacheco had "swung" at him on the stairs and that he had feared Pacheco was going to stab him. According to appellant, Pacheco "owned a knife and used to play with it a lot." On a prior occasion, appellant had seen Pacheco pull out his knife and threaten to stab a person during a fight at a party. But after appellant stabbed Pacheco, he "didn't see a knife in [Pacheco's] hand. So [he] got pretty scared."

I

Juror Misconduct: Evidentiary Hearing

Facts

On June 5, 2006, appellant filed a motion for a new trial. One of the grounds of the motion was that "the verdict was tainted by juror misconduct." (Capitalization

omitted.) A hearing on the motion was set for June 12, 2006. On June 9, 2006, the prosecutor filed opposition to the motion for new trial. On June 12, 2006, appellant filed a response to the opposition.

In court on June 12, 2006, defense counsel represented that two jurors had informed him that, during the course of the trial, "there was a juror who was text messaging and speaking with a judge up north." Counsel also declared that a juror would testify that some of the male jurors had sexually harassed female jurors.

The prosecutor protested that she had not been served with appellant's response to her opposition to the motion for a new trial. The prosecutor also complained that, although the court had ordered defense counsel to disclose the names and expected testimony of any jurors to be called as witnesses, counsel had not provided her with this information. She requested that the hearing be continued.

Defense counsel responded that a juror, E.M., was "here right now" and should be permitted to testify. The prosecutor objected: "I do not think that it is appropriate or fair for any witness to get on that witness stand until I have had an opportunity to be served with the declaration from that witness, which is required under a motion for new trial . . . [¶] and to research the issue regarding what the juror is going to say and whether or not that is admissible in a motion for new trial." The court ruled that the prosecutor was "entitled to discovery of any statement of a witness that [counsel] may wish to offer in his motion for a new trial." It continued the matter to June 29, 2006.

On June 22, 2006, appellant faxed to the prosecutor the declaration of an alternate juror, N.L. N.L. declared that, "[f]rom the time of jury selection until the time of verdict," juror number 10 had continuously communicated with a "judge friend" about the case via text messaging on her "T-Mobile Blackberry." "When the jury was not sure what was going on or what procedurally would happen next, juror number ten would communicate with her friend and disclose to the jury what he said." "Further, there was a complete impropriety between the male and female jurors on the jury. The male jurors had complete domination over the female jurors." In addition, "[d]uring the course of some of the testimony and closing argument, [N.L.] noticed that juror number two was

frequently asleep." Finally, "[w]hen it came time to deliberate, some of the members of the jury, particularly the men, were adamant about reaching a verdict. It was known . . . that juror number ten had to leave out of town [*sic*] that Thursday and so those jurors wanted to reach a decision before [she] left. Those jurors were adamant about not wanting to start over with deliberations."

At the hearing conducted on June 29, 2006, the trial court denied appellant's motion for a new trial and refused to conduct an evidentiary hearing on the allegations of juror misconduct. Defense counsel argued, "Once this court was notified there was potential juror misconduct, you are obligated to conduct a hearing. You have not done that. That is a rock solid reversible error."

The Evidence of Juror Misconduct Was Insufficient to Require the Trial Court to Conduct an Evidentiary Hearing

Appellant contends that the trial court's refusal to conduct an evidentiary hearing to investigate juror misconduct "deprived [him] of his right to be tried by 12 impartial jurors and the due process of law." " '[W]hen a criminal defendant moves for a new trial based on allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations. . . .' [Citation.] '[A hearing] should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 581-582.)

The only evidence before the court was the declaration of N.L. The trial court acted within its discretion in declining to conduct an evidentiary hearing because N.L.'s declaration failed to demonstrate a " 'strong possibility that prejudicial misconduct [had] occurred.' " (*People v. Brown, supra,* 31 Cal.4th at p. 582) Since N.L. was an alternate juror, we presume that he was not present during jury deliberations. "Unless formally substituted, an alternate juror is prohibited from entering the jury room during the deliberation of the regular jurors. [Citation.]" (*People v. Adame* (1973) 36 Cal.App.3d

402, 405.) The court minutes show that no juror substitutions were made. Thus, as an alternate juror, N.L. could not have had personal knowledge of what had occurred during the deliberation of the regular jurors.[3] N.L.'s observations of juror number 10's communications with her "judge friend" must have been made during breaks in the trial. Nothing in N.L.'s declaration suggests that these communications were prejudicial to appellant. The declaration indicates that the communications related to procedural matters rather than appellant's guilt: "When the jury was not sure what was going on or what *procedurally* would happen next, juror number ten would communicate with her friend and disclose to the jury what he said." (Italics added.)

Since N.L. was not present during jury deliberations, he could not have witnessed the alleged "domination" of male jurors over female jurors at that stage of the proceedings, nor could he have witnessed the alleged rush of some jurors to reach a verdict before juror number 10's scheduled out-of-town trip. Moreover, these allegations of N.L. lack supporting detail. They are therefore inadmissible conclusions about the jurors' mental processes. (See *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (2008) 164 Cal.App.4th 1440, 1446 ["A jury verdict cannot be impeached by evidence of the jurors' mental processes and reasoning"; therefore, a juror's declaration that the jury was "rushed into deciding on a verdict . . . was properly disregarded."])

N.L. alleged that juror number two "was frequently asleep" during "the course of some of the testimony and closing arguments." These vague allegations were insufficient to require an evidentiary hearing because they failed to show that the juror was asleep during material portions of the trial. "Perhaps recognizing the soporific effect of many trials when viewed from a layman's perspective, . . . cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229,

[3] In her second supplemental opposition to appellant's motion for a new trial, the prosecutor stated: "After the jury instructions were read, the alternate jurors were sent upstairs and the deliberating jurors were taken into the jury room. The jurors remained separated until the verdict."

1349; see also *People v. Bowers* (2001) 87 Cal.App.4th 722, 731 ["the bare fact of sleeping at an unknown time for an unknown duration and without evidence of what, if anything, was occurring . . . at the time is insufficient to support a finding of misconduct or to conclude the juror was unable to perform his duty"].)

Refusal to Hear Juror E.M.'s Testimony

Appellant contends that the trial court erroneously refused to hear testimony from juror E.M. on June 12, 2006, when she was present in court and ready to testify. But if the court had allowed E.M. to testify, it would have conducted an evidentiary hearing. The court acted within its discretion in refusing to hear E.M.'s testimony because appellant did not " 'come forward with evidence [e.g., a declaration from E.M.] demonstrating a strong possibility that prejudicial misconduct [had] occurred.' " (*People v. Brown, supra,* 31 Cal.4th at pp. 581-582.)

Defense counsel's nonstipulated, unsworn offer of proof as to E.M.'s proposed testimony did not constitute evidence. (*Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1513; *Mundell v. Dept. Alcoholic Bev. Control* (1962) 211 Cal.App.2d 231, 239.) Even if it did constitute evidence, it would not have demonstrated " 'a strong possibility that prejudicial misconduct [had] occurred.' " (*People v. Brown, supra,* 31 Cal.4th at p. 582.) Counsel's offer of proof was that E.M. would testify that (1) "there was a juror who was text messaging and speaking with a judge up north," and (2) some of the male jurors had sexually harassed female jurors. Counsel did not indicate the content of the text messages, nor did he explain how the alleged sexual harassment could have affected the verdict.[4]

Furthermore, on June 12, 2006, the trial court did not permanently refuse to hear E.M.'s testimony. At the prosecutor's request, the court continued the hearing to allow her time to discover the content of E.M.'s proposed testimony and research its

[4] Defense counsel alleged: "During the course of the proceedings, there were epithets that were used by male jurors against women female jurors, including one juror speaking of his lack of sex and the fact that he has one testicle and things of that nature that would clearly amount to sexual harassment in any context."

admissibility. Appellant has failed to show that the court abused its discretion in granting this continuance. Nothing in the record suggests that E.M. would be unavailable to testify at future hearings. E.M. provided the court with her telephone number and home address. She indicated that she would be available to come to court on the next hearing date - June 29, 2006 - if a party subpoenaed her.

II

Juror Misconduct: Presumption of Prejudice

Appellant contends that juror number 10's communications with her "judge friend" constituted misconduct resulting in a presumption of prejudice. He argues that the judgment must be reversed because the People did not rebut that presumption.

Based on N.L.'s declaration, juror number 10 committed misconduct. "A juror who 'consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors' commits misconduct. [Citation.] Jury misconduct 'raises a rebuttable "presumption" of prejudice.' [Citation.] [¶] On appeal, the determination whether jury misconduct was prejudicial presents a mixed question of law and fact 'subject to an appellate court's independent determination.' [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 192.)

"We assess prejudice by a review of the entire record. 'The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test.' [Citation.]" (*People v. Tafoya, supra,* 42 Cal.4th at p. 192.)

The presumption of prejudice arising from juror number 10's misconduct was rebutted. As discussed above, N.L. was an alternate juror with no personal knowledge of what had occurred during jury deliberations. Her declaration indicates that the information furnished by juror number 10's "judge friend" related to procedural matters

rather than appellant's guilt. Nothing in the declaration suggests that the "judge friend" communicated information prejudicial to appellant. Accordingly, there was no substantial likelihood of juror bias.

III

Denial of Motion for a Continuance: Abuse of Discretion

Facts

On June 22, 2006, the prosecutor filed a first supplemental opposition to appellant's motion for a new trial. That same day, appellant faxed to the prosecutor the declaration of juror N.L.

On June 26, 2006, the prosecutor faxed to appellant a second supplemental opposition that discussed only N.L.'s declaration. On June 27, 2006, the trial court received appellant's request that the hearing on his motion for a new trial be continued for 30 court days. Defense counsel alleged that he was engaged in a murder trial on another matter (the "Taylor" matter) and had not received the prosecutor's first supplemental opposition until June 22, 2006. Because counsel had "been working exclusively on the Taylor trial," he had "not had time to read, research, or prepare a response." Counsel alleged that he would "not be able to respond until after . . . Taylor's trial."

The prosecutor filed opposition to the motion for a continuance. At the hearing conducted on June 29, 2006, the trial court announced that it was "denying the motion for continuance based upon the fact that there is no legal cause stated." The court then denied the motion for a new trial.

The Trial Court Did Not Abuse Its Discretion

Appellant contends that the trial court abused its discretion and violated his due process rights by denying his motion to continue the hearing on his motion for a new trial. "[T]he trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. [Citations.] A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence. [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) The trial court's "discretion may not be exercised so as to deprive the defendant or his attorney of a

reasonable opportunity to prepare. [Citations.]" (*People v. Sakarias* (2000) 22 Cal.4th 596, 646.) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] . . . [¶] [D]iscretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

The trial court's denial of a continuance did not exceed the bounds of reason. In support of the motion for a continuance, defense counsel alleged that, because he had "been working exclusively" on the Taylor trial, he had "not had time to read, research, or prepare a response" to the prosecutor's first supplemental opposition to the motion for a new trial. But the trial court was not required to accept this conclusionary allegation without any supporting details. Counsel never explained why he had been unable to review the first supplemental opposition when he was not actually in court. Counsel was in trial for three hours and thirty minutes on June 22, 2006, when he received the first supplemental opposition. On the following day - a Friday - the Taylor court was dark. On Monday counsel was in trial for three hours and forty-five minutes. On Tuesday, two days before the June 29th hearing, he was in trial for only two hours and fifty minutes.

Counsel did not indicate that the Taylor case was particularly demanding of his time because of its complexity. Nor did he indicate that the issues raised in the prosecutor's first supplemental opposition were particularly difficult. In opposing the continuance, the prosecutor alleged that her first supplemental opposition "does not include any new law, facts or evidence." Counsel did not attempt to refute this allegation.

Because the trial court did not abuse its discretion, we reject appellant's contention that the denial of his motion for a continuance violated his due process rights.

IV

Denial of Motion for a Continuance: Effective Assistance of Counsel

When the trial court said that it was going to deny appellant's motion for a continuance, defense counsel protested, "I'm not prepared to discuss anything. I'm not

prepared." The court responded, "Are you standing then on the arguments you made before on your motion for new trial?" Counsel answered, "I'm not standing on anything. I have told this court I'm not ready. I told this court when I was ready last time, and you refused to allow us - -" The court cut counsel off and said that it was "going forward with a motion for new trial." The court asked counsel if he wanted to argue the matter. Counsel replied, "I'm not prepared, so the court can make the call. I informed you I'm not prepared."

Appellant contends that, because counsel was not prepared to argue the new trial motion, the denial of a continuance violated his right to the effective assistance of counsel and to present an effective defense. "The burden of proving ineffective assistance of counsel is on the defendant. [Citation.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

A defendant claiming ineffective assistance "must prove prejudice that is a ' "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supar,* 466 U.S. at p. 694.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland v. Washington, supra,* 466 U.S. at p. 697.)

We need not consider whether defense counsel was deficient in not being prepared to argue the motion for a new trial. Appellant has failed to "show that there is a

reasonable probability that, but for counsel's [lack of preparation], the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) Appellant contends that he was prejudiced because prepared counsel would have argued the merits of the juror misconduct issue. But such argument by counsel would have been to no avail. For the reasons discussed above in parts I and II, juror N.L.'s declaration was insufficient to show a substantial likelihood of juror bias.

Appellant also contends that he was prejudiced because prepared counsel would have presented the testimony of juror E.M., who had appeared in court on June 12, 2006, and was willing to testify at that time. But all we know about E.M.'s proposed testimony is based on defense counsel's offer of proof, discussed above in part I. That offer of proof was insufficient to show a substantial likelihood of juror bias.

Since appellant was not denied the effective assistance of counsel, it follows that he was also not denied his constitutional right to present an effective defense.

V

Section 1050, Subdivision (g)(2)

Section 1050, subdivision (g)(2), provides that, in cases involving murder, "good cause" for a continuance includes situations where "the prosecuting attorney assigned to the case has another trial . . . in progress . . . ." In such cases, the continuance "shall be limited to a maximum of 10 additional court days." (*Ibid*.) Appellant contends that, to the extent this provision applies only to prosecutors, it "violates the due process requirements of reciprocity and fundamental fairness." (Bold type and capitalization omitted.) Because of this constitutional infirmity, appellant requests that we construe the statute "to apply to both prosecutors and defense counsel who are seeking continuances."

"By failing to raise these issues in the trial court, [appellant] deprived the court of the opportunity to provide him with the due process safeguards he now contends he was denied. Accordingly, we conclude [appellant] waived the constitutional claims he now seeks to pursue by failing to raise them in the trial court." (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.)

Even if we were to construe section 1050, subdivision (g)(2), as applying to both prosecutors and defense counsel, appellant would not have been entitled to the granting of his motion for a continuance because he asked for 30 additional court days instead of the maximum 10 additional court days permitted under the statute. (8/7 CT: 7)

VI

Claimed Allen Charge/Gainer Error

After instructing the jury, the trial court asked if anyone had questions. One of the jurors said, "[I]f we can't all come to an agreement, then he's charged with a lesser charge or --" The court cut the juror off by declaring: "No. If you can't come to an agreement, that's a mistrial. We start all over again. We're hopeful you will come to an agreement." Defense counsel objected to the court's response on the ground that it constituted the giving of an "*Allen* charge" to the jury.[5] In his opening brief appellant reiterates counsel's position, claiming that the alleged *Allen* error "deprived him of his constitutional right to due process and a fair trial by 12 impartial jurors." (Bold and capitalization omitted.)

In *People v. Gainer* (1977) 19 Cal.3d 835, our Supreme Court "ruled impermissible the *Allen* or 'dynamite' charge, a jury instruction designed to 'blast' a verdict out of a deadlocked jury." (*People v. Barraza* (1979) 23 Cal.3d 675, 682.) The charge "encouraged the minority jurors to reexamine their views in light of the views expressed by the majority, noting that a jury should consider that the case must at some time be decided." (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1120.) The *Gainer* court declared: "It is simply not true that a criminal case 'must at some time be decided.' . . . [T]he inconclusive judgment of a hung jury may well stand as the final word on the issue of a defendant's guilt." (*People v. Gainer, supra,* 19 Cal.3d at p. 852, fn. omitted.) Thus, "it is error for a trial court to give an instruction which . . . states or implies that if the jury fails to agree the case will necessarily be retried." (*Ibid*., fn. omitted.)

Here the trial court said that, if the jurors could not agree, a mistrial would be declared and "[w]e start all over again." We are not persuaded that this brief comment.is

[5] *Allen v. United States, supra,* 164 U.S. at pages 501-502 [17 S.Ct. 154, 41 L.Ed. 528].

Gainer error. We do observe that a reversal is warranted only if "it was reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. [Citation.]" (*People v. Gainer, supra,* 19 Cal.3d at p. 855.) "[W]hen the statement is the central feature of instructions given to a deadlocked jury, it is more likely to have tainted their subsequent verdict than when the panel has evinced no division and the statement merely accompanies a requested rereading of portions of the testimony or previous instructions." (*Id*., at p. 856, fn. 20.)

Here the trial court made its comment before the jury began to deliberate. Nothing in the record indicates that the jury had any difficulty in reaching a unanimous verdict. The deliberations lasted only three hours and thirty-five minutes. Thus, it is not reasonably probable that a result more favorable to appellant would have occurred in the absence of the trial court's brief remark.

VII

Discovery Violation - Waiver

Appellant contends that the People violated discovery requirements by failing to disclose an inculpatory statement that a witness - Rodolfo Hernandez - had heard appellant make immediately prior to stabbing Pacheco. During appellant's cross-examination, Hernandez testified that, "as [Pacheco] was running up the stairs, [appellant] said, 'Let me finish him off.' " Hernandez was "pretty sure" that he had told the prosecutor and investigating officer about this inculpatory statement.

In his motion for a new trial, appellant claimed that he had not been given "advance notice" of the inculpatory statement, which had been "provided to the prosecution prior to trial." In her opposition to the motion, the prosecutor did not deny appellant's claim. But the prosecutor stated that the inculpatory statement "was consistent with the prior statements given by" Hernandez. She did not indicate the content of these prior consistent statements.

In his opening brief, appellant asserts: "The prosecutor had apparently attempted to ambush the defense with this surprise evidence." Appellant argues that respondent's failure to carry out its "discovery disclosure duties deprived [him] of a fair jury trial and

due process . . . . This omission also deprived [his counsel] of sufficient time to prepare to cross-examine [Hernandez] concerning these purported statements, rendering his right to effective confrontation constitutionally inadequate."

Any discovery violation was waived because appellant failed to object to the admission of his inculpatory statement. "We reach this conclusion because ' "questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. [Citation.]" ' [Citations.] In light of [appellant's] failure to object on this ground at trial, the trial court did not hold a hearing on [appellant's] factual assertion that the People . . . failed to disclose potentially inculpatory evidence . . . . 'The objection requirement is necessary in criminal cases because a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.' " [Citation.]' [Citations.]" (*People v. Williams* (2008) 43 Cal.4th 584, 620; see also *People v. Burgener* (2003) 29 Cal.4th 833, 876 ["defendant waived any discovery claim by failing to object on this basis below"].)

VIII

Discovery Violation - Effective Assistance of Counsel

Appellant contends that the People's failure to disclose his inculpatory statement is in itself sufficient to establish a denial of his right to the effective assistance of counsel, irrespective of whether counsel committed unprofessional error: "Where, as here, the prosecution does not disclose a defendant's damaging statement that has substantial probative weight, that defendant is deprived of effective representation. Such a critical inculpatory fact must be disclosed so that the defense can prepare to rebut it or diminish its impact."

Appellant's contention is insupportable because a claim of ineffective counsel must be predicated on unprofessional error: "[T]he defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment." (*Strickland v. Washington, supra,* 466 U.S. at p. 687.) "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." (*Id*., at p. 690)

IX

Effective Assistance of Counsel - Failure to Object

Appellant contends that counsel was deficient because he failed to object to the admission of the inculpatory statement or "to seek its exclusion as a discovery violation." "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (*Strickland v. Washington, supra,* 466 U.S. at p. 690.) "[U]nless the record reflects the reason for counsel's actions or omissions, or precludes the possibility of a satisfactory explanation, we must reject a claim of ineffective assistance raised on appeal. [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) " '[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' [Citation.]" (*People v. Harris* (2008) 43 Cal.4th 1269, 1290.)

We reject appellant's claim of ineffective assistance because "the present record does not preclude the possibility that defense counsel's actions were based upon reasonable strategic decisions." (*People v. Ledesma, supra,* 39 Cal.4th at p. 746.) During counsel's cross-examination of Hernandez, the witness asked, "May I add something, please?" The court responded, "You may add." Hernandez then testified concerning appellant's inculpatory statement. Counsel could have reasonably believed that an objection to the court's response, "You may add," would have given the jury the impression that he was trying to suppress evidence. Once the evidence was in, counsel could have reasonably believed that, instead of requesting that it be excluded, the better strategy was to deny that the statement had been made. Both appellant and another witness, Christopher Weisser, testified to this effect.

In any event, appellant has failed to show "that there is a reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would

have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) The record does not reveal what information was furnished by the People to appellant prior to trial. If, as the prosecutor claimed, appellant's inculpatory statement "was consistent with the prior statements given by" Hernandez and turned over to the defense, the trial court may have refused to exclude the inculpatory statement. But even if the inculpatory statement had been excluded, the evidence against appellant would still have been overwhelming. Counsel's alleged unprofessional errors are insufficient "to undermine confidence in the outcome." (*Ibid*.)

X

Appellant's Presence During Impact Statements by Victim's Family

Pursuant to section 1191.1, members of Pacheco's family were permitted to express their views at the sentencing hearing. Appellant contends that the trial court abused its discretion by requiring him to be physically present during these impact statements and by permitting family members to verbally attack him. We decline to consider this contention on its merits because appellant has not shown that he suffered any prejudice. Appellant acknowledges "that the court had no discretion to give any other sentence" than the one imposed: 16 years to life.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Charles D. Sheldon, Judge

Superior Court County of Los Angeles

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